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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-6650

RICHARD BROWN,

Petitioner,

VS.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Supreme Court of Illinois is reported at 56 Ill. 2d 312, 307 N.E. 2d 356 (1974). Appendix, page 107.

JURISDICTION

The jurisdiction of this Court is invoked to review a final judgment of the Supreme Court of Illinois pursuant to Title 28 U.S.C. § 1257(3). The judgment of the court below was entered on January 31, 1974. No petition for rehearing was filed. The Petition for Writ of Certiorari was filed May 1, 1974 and granted October 21, 1974.

CONSTITUTIONAL PROVISIONS

Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to the United States Constitution:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce

any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a voluntary statement given to police after full *Miranda* warnings should be excluded from evidence at trial because the initial arrest was later found to be without probable cause?

2. Whether the Fourth Amendment exclusionary rule should be extended to Fifth Amendment claims otherwise protected by clearly enunciated procedural safeguards?

STATEMENT OF THE CASE

During the early morning hours of May 6, 1968, Roger Corpus was murdered with a .38 caliber revolver in his second floor apartment on the West Side of Chicago. About five o'clock that afternoon, the victim's mother and a neighbor discovered the body, bound hand and foot.

The police were summoned and questioned Ernestine Corpus, the victim's mother (A. 69). She told the officers that on the previous evening she had been watching television with her mother and daughter, Constance DeLoach, in her apartment, which was located directly below her son's. Around 11:45 P.M., through the glass panel of her front door, she observed two men enter the vestibule, where they began talking. One man, who was later identified at trial as the petitioner, peered through Mrs. Corpus' front window (A. 71). Both men then went upstairs and entered the victim's apartment (A. 66-67). Mrs. Corpus did not know either man, but was able to give a general description of their clothing to the police (A. 79).

About one o'clock, Mrs. Corpus went to bed. Although she could hear people walking and other noises from her son's apartment, she did not hear anything which struck her as unusual (A. 67).

On the morning of May 7, 1968, Arthur Corpus, the victim's brother, had a conversation with Detective Denson in his mother's apartment. At that time, he furnished the officer with the name Richard Brown, apparently as a person acquainted with the victim (A. 73). Although both Arthur Corpus and the victim's sister, Constance DeLoach [who had seen Brown in the vestibule on the night of the

murder, (A. 71)] knew Brown, they did not suggest to the police that Brown was responsible for their brother's death because "Nobody asked". (A. 74).

On May 8, 1968, Arthur Corpus spoke with Detective Lenz and another officer (A. 73), and furnished them with two additional names (A. 76).

Five days later, on May 13, 1968, Officers Lenz, Nolan, and Wasmund, armed with a photograph of petitioner, proceeded to Brown's apartment at about 5:00 P.M. (A. 77, 87). Officer Nolan stayed in the hallway, Officeer Lenz entered Brown's apartment, and Officer Wasmund remained at the front of the building (A. 14, 77, 87).

At 7:45 P M. Brown came up the rear stairs to his apartment. Officer Lenz, from a window position inside the apartment told petitioner he was under arrest. (A. 42). Brown began backing away. Officer Nolan came up behind petitioner in front of the door to the apartment and, with gun drawn, informed petitioner that he was under arrest. (A. 42). He took Brown inside the apartment and searched him, but found no weapon. (A. 15). Detective Nolan asked petitioner if he was Richard Brown, which petitioner denied. Detective Lenz informed him again that he was under arrest and told him that the arrest was for the murder of Roger Corpus. (A. 16)[1]. The officers compared the photograph of Brown with petitioner and determined that he was Richard Brown (A. 16, 43), handcuffed him (A. 93) and took him downstairs, through a lot to their car. (A. 43).

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1. Detective Nolan testified on the motion to suppress that he told the petitioner that he was under arrest for "investigation" of a murder. (A. 43).

During the fifteen to twenty minute ride to the station there was some casual conversation, but petitioner was not interrogated concerning the murder (A. 17, 44).

When the three arrived at the station shortly after eight o'clock, petitioner was taken to a second floor interrogation room with a window, table and four chairs (A. 7, 18, 45). The officers left petitioner alone in the room for about ten minutes while they picked up the case file (A. 18, 45). When they returned to the room, they immediately advised petitioner of his constitutional rights (A. 7, 18-19, 36, 45-46)[2] and Brown answered that he understood these rights (A. 7, 20, 37, 46).

The officers then told petitioner that they knew about an incident in a pool room where petitioner had fired a revolver into the ceiling (A. 20, 37, 46), to which petitioner responded "Oh, you know about that" (A. 21, 37). The officers then told Brown that they had recovered the bullet from the pool room shooting and had sent it to the Crime Lab for comparison with the bullets taken from the body of Roger Corpus (A. 20, 46). Brown then indicated "I want to tell you the truth. I want to get it off my chest. The best thing to do is to tell the truth". (A. 46). Brown then gave the officers a two-page statement which took approximately one-half hour to complete (A. 9, 23). Petitioner then signed the statement (A. 9, 38).

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2. Petitioner alleges that these warnings were defective since Officer Lenz on direct examination, when asked to reiterate the warnings given, failed to indicate that he had told petitioner that if he could not afford an attorney, one would be appointed (See, A. 7). This defect was corrected on cross examination (See, A. 19). And see the testimony of Officer Nolan (A. 37, 45-46) indicating full Miranda warnings were given.

Brown then agreed to accompany the officers in an attempt to locate Jimmy Cleggett, the man Brown had identified as the person who actually shot Roger Corpus. The three left the station about 9:30 P.M. (A. 9). They drove around the general area Cleggett was known to frequent, with petitioner leaving the car with the officers to look into various business establishments searching for Cleggett (A. 9).

Unsuccessful in this effort, the three then drove to central police headquarters at about 11:00 P.M. in an effort to obtain a picture of Cleggett. (A. 10, 39). They did not find one (A. 39). They left headquarters and returned to the same area. Petitioner identified Cleggett as one of three pedestrians crossing in front of the police car at an intersection and the officers arrested Cleggett (A. 10, 39). The four then returned to the station arriving at approximately 12:00 or 12:30 A.M. (A. 11, 39).

Petitioner was placed in the same interrogation room as earlier to await the arrival of an Assistant State's Attorney (A. 11, 39). He was not questioned during this period. (See, A. 11, 40).

The Assistant State's Attorney arrived at approximately 2:00 A.M. and after a brief conversation with the officers, spoke to petitioner alone (A. 11, 40). This conversation lasted about twenty minutes (A. 11, 40) and was preceeded by full *Miranda* warnings (A. 28-29), to which petitioner responded that he did not want a lawyer, he wanted to talk to the Assistant (A. 29).

When the court reporter arrived, he and Detective Nolan entered the room (A. 29). The Assistant then again informed petitioner of his constitutional rights (A. 30) and further told him that he would be charged with murder (A. 32). Petitioner answered that he knew his rights and

wanted to make a statement (A. 30). He then gave a half-hour statement (A. 30).

Petitioner was tried for the offense of murder before a jury by the Circuit Court of Cook County on January 14, 1970 (A. 65). At trial, petitioner's first statement to the police was admitted in evidence orally through the testimony of Detective Nolan (A. 89-92). His second statement to the Assistant State's Attorney was admitted also (A. 95-105).[3]

Petitioner was convicted of murder and sentenced to 15 to 30 years imprisonment, from which he appealed, arguing in part that his initial arrest was illegal and therefore both statements should have been suppressed as the "product of that custody." In a written opinion the Supreme Court of Illinois found that petitioner's arrest was made without probable cause (A. 108), but concluded:

> From our examination of the record, in the light of the circumstances shown by the testimony, we conclude that the giving of the *Miranda* warnings, in the first instance by the police officer and in the second by the Assistant State's Attorney, served to break the causal connection between the illegal arrest and the giving of the statements, and that defendant's act in making the statements was "sufficiently an act of free will to purge the primary taint of the unlawful invasion." (*Wong Sun* v. *United States*, 371 U.S. 471, at 486.) We hold, therefore, that the circuit court did not err in admitting the statements into evidence. (A. 109-110).

and affirmed petitioner's conviction.

Petitioner then filed a petition for Writ of Certiorari which this Court allowed on October 21, 1974 (A. 111).

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3. Petitioner's pretrial motion to suppress both statements was denied after an evidentiary hearing (A. 65).

ARGUMENT

I.

FULL COMPLIANCE WITH THE REQUIREMENTS OF *MIRANDA* v. *ARIZONA* ATTENUATES *PER SE* ANY TAINT ARISING FROM AN ILLEGAL ARREST IF A SUBSEQUENT STATEMENT BY ONE IN POLICE CUSTODY IS IN ALL OTHER RESPECTS VOLUNTARY.

Relying primarily upon the Fourth Amendment, the petitioner here argues that his arrest without probable cause irreparably taints the first statement which he gave to the police and, likewise, the second confession to an Assistant State's Attorney as the product or fruit of the first. To adopt this theory in this factual content, is to say that the warnings enunciated by this Court in *Miranda* v. *Arizona*, 384 U.S. 436 (1966) have no significance.

The primary concern in determining the admissibility at trial of a statement made by a defendant while in police custody or while otherwise significantly deprived of his freedom of action, is the protection of the defendant's right under the Fifth Amendment to remain silent.[4] *Mir-*

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4. This is not to say that the protection of fourth amendment guarantees may never be relevant to determining admissibility. Of course, in a given case, a fourth amendment violation may be so inextricably interwoven with the defendant's waiver of his fifth amendment rights as to require suppression of any statement made. See eg. *Wong Sun* v. *United States*, 371 U.S. 471 (1963) where federal agents, after first seeking entrance by subterfuge, subsequently break down the door of Blackie Toy's laun-

anda v. *Arizona*, 384 U.S. 436, 439, 444. This right represents the ultimate recognition of our legal system as accusatorial rather than inquisitorial in nature. "Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth." *Malloy* v. *Hogan*, 378 U.S. 1, 8 (1964). Indeed, in *Miranda*, *supra* at 461, this Court focused most sharply on the importance of the privilege against self-incrimination in our constitutional scheme.

> "We have recently noted that the privilege against self-incrimination—the essential mainstay of our adversary system—is founded on a complex of values. All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a fair state-individual balance, to require the government to shoulder the entire load, to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth In sum, the privilege is fulfilled only when the person is guaranteed the right to remain silent 'unless he chooses to speak in the unfettered exercise of his own will'." (384 U.S. at 460) (citations omitted).

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dry, pursue him into his living quarters in the rear and into the bedroom where his wife and child are sleeping and, with gun drawn, an agent places Toy under arrest, handcuffs him and begins to interrogate him concerning the narcotics traffic.

In this context, recognizing the paramount importance of the Fifth Amendment privilege, this Court in *Miranda* turned to a consideration of the effect of custodial police interrogation on effective individual utilization of the privilege and found the effect devasting.

Reviewing what the Court considered modern interrogation techniques, this Court found:

> From these representative samples of interrogation techniques, the setting prescribed by the manuals and observed in practice becomes clear. In essence, it is this: To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. To obtain a confession, the interrogator must patiently maneuver himself or his quarry into a position from which the desired objective may be attained. When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights.
>
> Even without employing brutality, the "third degree" or the specific stratagems described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals. (384 U.S. at 455) (footnotes omitted)

In assessing the effect of these procedures on the individual, the Court commented:

> It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To

> be sure, this is not physical intimidation, but it is equally destructive of human dignity. The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles — that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice. (384 U.S. at 457-58) (footnote omitted)

and

> We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored. (384 U.S. at 467.)

This Court then announced specific procedural safeguards which it deemed effective to secure the privilege against self-incrimination during custodial interrogation.

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking, there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions

> or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.
>
> (384 U.S. at 444-45)

and coupled these safeguards with the stringent remedy of prohibiting the use by the prosecution of any statement, either inculpatory or exculpatory, resulting from custodial interrogation of the defendant absent an affirmative showing of compliance with these procedures. (384 U.S. at 444).

The significance then of these procedures in securing the protection of the Fifth Amendment cannot be understated: "The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation." (384 U.S. at 476).

To adopt the position in the factual context of this case that the petitioner's first statement to the police officers following full compliance with these enunciated procedural safeguards must be excluded as a fruit of an illegal arrest is to flagrantly contradict the holding of *Miranda* and to reduce the procedures enunciated therein to nothing more than a meaningless "preliminary ritual".

Here, petitioner was arrested for the murder of Roger Corpus or "for investigation of the murder" by two police officers outside of his apartment at 7:45 P.M.[5] He was frisked, handcuffed and then asked if he was "Rich-

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5. Petitioner places heavy reliance on the fact that both officers had drawn their guns at the time of the arrest. This reliance is misplaced. Normal police procedure and indeed the dictates of common sense provide for this type of action in effectuating the arrest of a defendant for a murder committed with a gun.

ard Brown". He denied it. The officers then took Brown downstairs, through a lot to their squad car and drove him to the station. During the 15 to 20 minute ride to the station, petitioner sat alone in the rear seat, admitted being Richard Brown, and proceeded to conduct a casual conversation with the officers.[6] Upon arriving at the station, petitioner was taken directly to a second floor interrogation room with a window, four chairs, and a table. He was not handcuffed at this time since he himself indicated he was smoking throughout the evening. (A. 58). The officers left him alone for five to ten minutes while they picked up the case file and then returned.

Upon returning to the room, Detective Lenz gave the petitioner the warnings required by *Miranda* v. *Arizona*, *supra*, and specifically asked him if he wanted a lawyer present at that time, to which the petitioner responded that he did not. After the petitioner told Detective Lenz that he understood the warnings, the Detective then mentioned the incident in the pool room in which the petitioner had fired a revolver into the ceiling. The officers indicated that the bullet had been retrieved and sent to the Crime Lab for comparison with the bullets taken from the body of Roger Corpus. After stating, "Well, you know about that" or words to that effect, petitioner then said, "I want to tell you the truth. I want to get it off my chest. The best thing to do is to tell the truth." (A. 46). The petitioner then, at 8:45 P.M., one hour after his arrest, forty-five minutes after arriving at the station, and thirty to thirty-five minutes after being given his *Miranda* warnings, gave a two-page statement in the form of questions and answers

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6. The petitioner in his brief nowhere disputes the fact that he was not interrogated during this drive. See Petitioner's Brief, 23.

to the officers. This statement took approximately twenty-five minutes to complete. At the end of this time, petitioner agreed to help the officers look for Jimmy Cleggett, the man who Brown contended actually shot the victim.

Preparatory to leaving the station, petitioner told the officers that he wanted to "turn State's evidence" against Cleggett because Cleggett had actually done the shooting and Brown had had no prior idea that Cleggett would do that. (A. 26). The two detectives and petitioner left the station around 9:30 P.M. and drove to the area of the city Brown knew Cleggett to frequent. They then proceeded to drive around the area, with petitioner and the officers getting out of the car at several points so that Brown could look into various businesses in an effort to locate Cleggett. When these efforts proved unsuccessful, the party drove to the central police station in an unsuccessful effort to obtain a photograph of Cleggett. They left this building about 11:00 P.M. and returned to the same general area searching for Cleggett, visiting the same places of business as earlier. While driving, petitioner noticed Cleggett in a group of three pedestrians crossing in front of the police car at an intersection. The officers arrested Cleggett. All four then returned to the station, arriving about 12:15 A.M.

Petitioner was placed in the same interrogation room and given some coffee. He had a brief conversation with Detectives Nolan and Lenz, who were also engaged in questioning Cleggett in a separate room.

At 2:00 A.M. an Assistant State's Attorney arrived. After a brief conversation with Detectives Nolan and Lenz concerning the case background, the Assistant entered the interrogation room to speak with Brown. Upon entering the room, the Assistant told Brown he was entitled to have an attorney present. Brown responded that he knew

that; the officers had informed him of his constitutional rights. The Assistant then again gave Brown full *Miranda* warnings (A. 29), to which Brown responded that he did not want a lawyer; he wished to speak to the Assistant (A. 29). They had a brief conversation alone, at which time the Assistant told Brown that he would be charged with murder. (A. 32). Then a court reporter and Detective Nolan joined them and a written statement was taken from Brown which was later admitted at trial.

Prior to the taking of this second statement, the Assistant again informed Brown of his rights per *Miranda* (A. 30), to which Brown responded that he knew his rights and wanted to make the statement (A. 30). The statement took approximately one-half hour and, in substance, was virtually identical to the statement given to the detectives earlier.

Neither of these statements is challenged as involuntary under traditional concepts, i.e., as the product of brutality, extended questioning without food or sleep. And, indeed, neither is open to such challenge. The record clearly reflects the conditions under which petitioner was questioned; the officers provided him with coffee and water; the Assistant State's Attorney offered him food; and he had his own cigarettes. The actual periods of interrogation were quite short and immediately followed full *Miranda* warnings. Prior to the second statement, petitioner had been out of the police station on the street with the officers for almost three hours, during which period he was not interrogated at all.

Nor does petitioner seriously contend that either statement was taken in violation of *Miranda* v. *Arizona, supra.*[7]

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7. There is a passing reference to alleged trickery and deceit in securing the first statement in Petitioner's Brief

Rather, petitioner argues that his unlawful arrest effectively tainted his subsequent statement to the officers, and the second statement to the Assistant State's Attorney as the "fruit" of the first under *Wong Sun* v. *United States*, 371 U.S. 471 (1963).[8] That decision, however, does not mandate the conclusion suggested by petitioner.

The decision in *Wong Sun* was grounded primarily on the Fourth Amendment and the policies underlying that provision. In that context, it considered the admissibility of verbal statements by an accused which were the immediate and direct product of a Fourth Amendment violation. In that very limited context, this Court said:

> Thus, verbal evidence *which derives so immediately from an unlawful entry and an unauthorized arrest* as the officers' action in the present case is no less the "fruit" of official illegality than the more common tangible fruits of the unwarranted intrusion.
>
> (371 U.S. at 485) (footnote and citation omitted) (emphasis added)

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at page 22-23, which he argues dissipated the effect of the *Miranda* warnings. The factual basis for this claim, as with so many others in this case, comes exclusively from petitioner's testimony on the motion to suppress, which was rejected by the trial court when he denied the motion. Both officers testified that they told petitioner of the pool room incident and that a bullet from the ceiling had been sent to the Crime Lab for comparison with the bullets from the victim's body. This information was all true. Both officers denied telling Brown that the bullets had been compared and in fact had been found to have been fired from the same gun. And neither officer testified that any mention at all was made to petitioner concerning fingerprints.

8. This applicability of this decision was evidently extended to state court proceedings in *Traub* v. *Connecticut*, 374 U.S. 493 (1963).

The officers' actions in *Wong Sun*, the Court found were taken in violation of the Fourth Amendment. Acting solely on information received from a person whom they did not know to be a reliable informant and which did not lead them directly to James Wah Toy, the agents proceeded to Toy's laundry and, by subterfuge, unsuccesfully attempted to gain admittance at six o'clock in the morning. One agent then identified himself to Toy. Toy slammed the door and ran through the laundry to his living quarters and into the bedroom, where his wife and child were asleep. The agents broke down the door and ran after him into the bedroom. Agent Wong drew his gun, pulled Toy's hand from the nightstand drawer, placed him under arrest, handcuffed him, and one agent then accused him of selling narcotics to the informant. Toy's response to that accusation, made in the bedroom where his wife and child were sleeping, contemporaneously with the illegal entry and arrest were held to be so immediately derived from the illegal entry and arrest as to require suppression under the Fourth Amendment.

Then, in considering the admissibility of physical evidence received from a third person against Toy, which evidence was obtained as a direct result of Toy's suppressed bedroom declaration to the police, this Court stated:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." (371 U.S. at 487-88) (citation omitted)

Utilizing this primary Fourth Amendment test, this Court then found the statement made by Wong Sun admissible in evidence since it was not the direct fruit of that arrest, i.e., "that the connection between the arrest and the statement had become so attenuated as to dissipate the taint". (371 U.S. at 491) (citation omitted).

Thus, *Wong Sun* treats a substantially different situation on its basic facts than that presented by this case. In that context, it fashions a rule which, to a limited extent, reaches verbal statements made by an accused. In determining the precise parameters of that limitation, one factor is paramount — *Wong Sun* was decided prior to *Miranda, supra.* Therein lies the fallacy in petitioner's argument here.

While the Court in *Wong Sun,* given the then-current status of the law, could, in referring to the Fourth Amendment exclusionary rule, say, "Nor do the policies underlying the exclusionary rule invite logical distinction between physical and verbal evidence" (371 U.S. at 486), that statement, in the narrow factual situation presented here, is no longer accurate, given *Miranda.*

There is a significant difference between items of physical evidence seized pursuant to an illegal arrest, where the accused has no control of the situation and no opportunity to make a free and rational choice affecting seizure and a verbal statement given, not at the time of arrest, but after transportation to the police station and immediate and full compliance with the procedural safeguards enunciated in *Miranda.* At this point, if *Miranda* means anything, the defendant stands in a substantially different posture than the defendant subjected to a search for physical evidence at the time of an illegal arrest. And if that defendant chooses, after his Fifth Amendment rights have been fully protected and voluntarily waived, to make

a statement, it can hardly be said that such a statement "has been come at by exploitation of that [initial] illegality." To hold otherwise is, in effect, to adopt the "but for" test rejected by this Court in *Wong Sun* — but for the illegal arrest, the defendant would not have confessed. Compare *Davis* v. *Mississippi*, 394 U.S. 721 (1969) (physical evidence).

Respondent thus suggests that the proper rule to be applied in this case is the one adopted by the Supreme Court of Illinois[9] — compliance with the dictates of *Miranda* v. *Arizona* attenuates *per se* any illegal arrest taint from an otherwise voluntary statement and here renders petitioner's statement to the police and consequently, his second statement to the Assistant State's Attorney, admissible in evidence.[10]

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9. Accord: *State* v. *LaRosa*, 313 A. 2d 375 (R.I. 1974); *People* v. *Tucker*, 314 N.E. 2d 276 (Ill. App. 1974); *State* v. *Dillard*, 260 So. 2d 675 (La. 1972); *People* v. *Trueblood*, 480 P. 2d 548 (Colo. 1971); *State* v. *Hooper*, 267 N.E. 2d 285 (Ohio 1971); *Grimes* v. *State*, 244 So. 2d 130 (Fla. App. 1971).

Contra: *People* v. *Johnson*, 450 P. 2d 865 (Cal. 1969); *Bynum* v. *State*, 490 P. 2d 531 (Okla. 1971). But see: *United States* v. *Villano*, 485 F. 2d 1333 (10th Cir. 1973); *United States* v. *Lepinski*, 460 F. 2d 234 (10th Cir. 1972); *People* v. *Robinson*, 358 N.Y. 2d 230 (1974); *Commonwealth* v. *Gilbert*, 314 N.E. 2d 111 (Mass. 1974); *State* v. *Loeffer*, 211 N.W. 2d 1 (Wisc. 1973); *Commonwealth* v. *Logan*, 296 A. 2d 755 (Pa. 1972), for cases placing exclusive reliance on traditional voluntariness and *Miranda* compliance. Cf. *Bretti* v. *Wainwright*, 439 F. 2d 1042 (5th Cir. 1971) (warnings prior to consent to search breaks taint of illegal arrest).

10. It should be emphasized that the issue presented here and thus, the suggested rule, are narrow in scope. Respondent does not suggest that such a *per se* attention rule

Such a rule gives due regard to the complex of values protected by the Fifth Amendment and the due process clause of the Fourteenth Amendment since it requires as a prerequisite a finding that the statement made was voluntary in the traditional sense. Additionally, it recognizes the importance of the procedural safeguards deemed by this Court to be required to overcome the coercive pressures of custodial police interrogation. And finally, it precludes an unwarranted extension of Fourth Amendment exclusionary rules to a situation where they properly have no application.[11]

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necessarily applies to cases where circumstances attendant to an illegal arrest are particularly outrageous (which would be a factor relevant to the voluntariness determination) or to cases where the defendant is confronted during interrogation with evidence seized pursuant to the illegal arrest and a statement precipitated thereby. See, e.g., *McCloud* v. *Bounds*, 474 F. 2d 968 (4th Cir. 1973). We deal here only with a routine arrest, later found to be without probable cause, followed by a brief stationhouse interrogation conducted in compliance with *Miranda* and traditional Fifth Amendment dictates concerning voluntariness.

11. This rule is in no way intended nor does it, minimize the importance of an individual's Fourth Amendment rights. However, this Court, as well as most lower federal and state courts have consistently recognized that a Fourth Amendment violation does not render subsequent statements inadmissible *per se*. See, e.g., *Wong Sun* v. *United States, supra; Commonwealth ex rel. Craig* v. *Maroney*, 348 F. 2d 221 (3rd Cir. 1965); *Thompson* v. *Warden*, 413 F. 2d 454 (4th Cir. 1969); *United States* v. *Close*, 349 F. 2d 841 (4th Cir. 1965); *Edwards* v. *Swenson*, 454 F. 2d 1106 (8th Cir. 1972); *Leonard* v. *United States*, 391 F. 2d 537 (9th Cir. 1968); *United States* v. *Fallon*, 457 F. 2d 15 (10th Cir. 1972); *Butler* v. *State*, 296 So. 2d 673 (Miss. 1974); *Reed* v. *State*, 262 So. 2d 321 (Ala. 1972); *State* v.

II.

EXTENSION OF THE FOURTH AMENDMENT EXCLUSIONARY RULE TO CLAIMS WHICH ARE PROPERLY GOVERNED BY THE FIFTH AMENDMENT AND THE SAFEGUARDS ENUNCIATED THEREUNDER IS NOT ONLY UNWARRANTED, BUT UNDESIRABLE.

Since the petitioner here urges suppression of his statements pursuant to the Fourth Amendment, certain comments concerning the viability and efficacy of the exclusionary rule are required.

The rule, as enunciated in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), requires the suppression of evidence seized in violation of the Fourth Amendment. This is true despite the fact that issues concerning the reasonableness of searches and seizures are among the most difficult in the law and are highly subject to inconsistent resolution. See, *Coolidge* v. *New Hampshire*, 403 U.S. 443, 483 (1971).

Fair, 467 S.W. 2d 938 (Mo. 1971); *People* v. *Briggs*, 36 A.D. 2d 790, 319 N.Y.S. 2d 374 (1971); *People* v. *Zakrzewski*, 36 A.D. 2d 646, 318 N.Y.S. 2d 94 (1971); *State* v. *Newell*, 462 S.W. 2d 794 (Mo. 1971); *State* v. *Funchess*, 179 S.E. 2d 25 (S.C. 1971); *Commonwealth* v. *Daniels*, 317 A. 2d 237 (Pa. 1974); *Commonwealth* v. *Boyer*, 297 A. 2d 493 (Pa. 1972); *Commonwealth* v. *Bishop*, 228 A. 2d 661 (Pa. 1967). Contra: *United States* v. *Burhannon*, 388 F. 2d 961 (7th Cir. 1968); *People* v. *Young*, 35 A.D. 1061, 316 N.Y.S. 2d 379 (1970); *People* v. *Moreno*, 491 P. 2d 575 (Colo. 1971).

Absent such a *per se* rule of exclusion, due regard for the *Miranda* rule requires the conclusion suggested by respondent here at no sacrifice to individual rights, since it is highly unlikely that police officers would intentionally engage in practices violative of the Fourth Amendment while scrupulously complying with *Miranda*.

Its stated purpose is to deter illegal police conduct: *Linkletter* v. *Walker,* 381 U.S. 618 (1965). Yet, there is no evidence that the rule in fact fulfills this purpose. See, Oaks, "Studying the Exclusionary Rule in Search and Seizure," 37 U. Chi. L. Rev. 665 (1970). Indeed, this Court has recognized the inability of the rule to deter in certain contents. *Terry* v. *Ohio,* 392 U.S. 1, 12-15 (1968). And see, Horowitz, "Excluding the Exclusionary Rule," 47 L. A. Bar Bull., 91, 92 (1972); Barrett, "Exclusion of Evidence Obtained by Illegal Searches," 43 Calif. L. Rev. 565, 592-93 (1955). And in recent years, the validity of the rule has been the subject of increasing concern. See, *Bivens* v. *Six Unknown Federal Narcotics Agents,* 403 U.S. 388, 411 (1971) (Burger, C. J., dissenting); *Coolidge* v. *New Hampshire,* 403 U.S. 443, 490, 493, 510 (1971) (Harlan, J., concurring) (Black and Blackmun, J. J., concurring and dissenting).

On policy grounds, the rule is inappropriate. See, e.g., Burger, "Who Will Watch the Watchman," 14 Am. U. L. Rev. 1 (1964). In practical terms, it benefits only the guilty, since an innocent man whose rights are violated must sue civilly for damages—a time-consuming and ineffective remedy. In application, it punishes society as a whole rather than the offending officer through the diversion of fundamental concerns of guilt or innocence and the suppression of evidence of unquestioned reliability. And it does this with no consideration given to whether the alleged violation was intentional and flagrant or merely a technical or good faith error [See, Friendly, "The Bill of Rights as a Code of Criminal Procedure", 53 Calif. L. Rev. 929, 952 (1965)] and with no concern for the severity of the crime involved. See, *Brinegar* v. *United States,* 338 U.S. 160, 183 (Jackson, J., dissenting); *People* v. *Defore,* 213 App. Div. 643, 652, 211 N.Y.S., 134, 142 (1925).

To extend the exclusionary rule beyond legitimate Fourth Amendment claims when the rule in its present context is validly subject to such severe criticisms and admittedly fails to fulfill its stated purpose,[12] is, at the very least, ill advised. This is especially true where, as here, the alleged violation more properly must be considered in light of the Fifth Amendment and the clearly enunciated procedural safeguards effective to secure the protections of that provision.

CONCLUSION

For the aforementioned reasons, the People of the State of Illinois respectfully request this Court to affirm the judgment of the Supreme Court of Illinois.

Respectfully submitted,

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12. To argue as petitioner does here that the exclusionary rule is a proper sanction for Fourth Amendment violations because other available sanctions are ineffective, begs the question. If the rule is ineffective in accomplishing its stated purpose, its current applicability renders it no more viable in any real sense than the remedies which petitioner criticizes.